



# Legal Minute

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## Hurricanes, Floods and Tornadoes: Helping Nonprofits Address Natural Disaster Related Concerns

By Michael Barton, Sutherland

*This Legal Minute addresses some of the legal concerns raised by Texas nonprofits following natural disasters.*

### EMPLOYMENT ISSUES:

#### **What liability could a nonprofit have if it required its employees to return to work after the hurricane before repairing potentially unsafe conditions in the nonprofit's facilities?**

Under federal law, the Occupational Safety and Health Act (the "OSH Act") generally requires every employer provide a place of employment free from recognized hazards that are likely to cause death or serious physical harm to employees. The Occupational Safety and Health Administration may inspect every establishment covered by the OSH Act. Employees may also anonymously report potentially unsafe facilities. Any violation of the OSH Act affecting job safety and health can carry up to a \$7,000 fine per violation. If the employer intentionally and knowingly permits the hazard, the violation could carry up to a \$70,000 fine. For more information, see <http://www.dol.gov/compliance/guide/osha.htm>.

Under state law, an employee injured by an unsafe working condition might bring a lawsuit for premises liability or negligence unless the nonprofit is a subscriber to the Texas Workers' Compensation system. The Texas Worker's Compensation system provides the only legal remedy for employees injured in the course and scope of employment.

#### **Do nonprofits need to continue to pay employees even if the nonprofit could not reopen due damage/lack of power after the hurricane?**

Employers should first look to the procedures set out in their written employee handbooks and employment agreements. Federal law generally does not require employers to pay nonexempt (hourly) employees for time not worked. Employers must pay exempt (salaried) workers, however, their full salary for any week in which the employee performs any work, without regard to the number of days or hours worked. Employers don't need to pay the exempt employees for any workweek in which they performed no work. (See 29 C.F.R. §541.602(a).) A nonprofit may be responsible for paying unemployment benefits to its employees.

### DATA BREACH ISSUES:

#### **What is a data breach?**

A data breach is a loss, theft, or other unauthorized access of data containing sensitive personal information, that might compromise the confidentiality or integrity of data. Sensitive personal information includes names, addresses, or telephone numbers, combined with Social Security numbers, driver's license numbers, account numbers, credit or debit card numbers, personal identification numbers or passwords.

#### **What duty does a nonprofit have to protect any sensitive personal information that it collects or maintains?**

Under the Texas Identity Theft Enforcement and Protection Act (the "ITEP Act"), each business in Texas is required to implement and maintain reasonable procedures to protect against the unlawful use or disclosure of sensitive personal information that the business collects or maintains. Each business must destroy records containing sensitive personal information that the business does not keep. (See Tex. Bus. & Com. Code Sections 48.001 to 48.201.)

## **What is a nonprofit's potential liability for not properly safeguarding sensitive personal information or disclosing a data breach?**

A nonprofit may be required to pay a fine of \$2,000 to \$50,000 per violation. Individuals or businesses damaged by a data breach may also bring a lawsuit against the nonprofit based on common law claims of negligence or breach of contract. A data breach can also damage a nonprofit's reputation and ability to solicit charitable contributions.

## **What should a nonprofit do if sensitive donor or other critical business information was lost or stolen as a result of a natural disaster?**

Under the ITEP Act, if a nonprofit suffers a data breach, it must disclose the breach (after becoming aware of it) to any Texas resident whose sensitive personal information was, or is reasonably believed to have been, acquired by an unauthorized person. The nonprofit must disclose the breach as quickly as possible in writing. If the nonprofit must notify more than 10,000 people of the breach, the nonprofit must also notify, without unreasonable delay, all consumer reporting agencies.

### **PROPERTY ISSUES:**

#### **Is a nonprofit responsible for repairing damage caused by a disaster to a leased facility?**

The commercial lease agreement between the nonprofit and landlord will govern which party has the duty to repair damage to a leased facility. Under Texas common law, if the lease does not expressly state which party is responsible to repair damages it is generally the tenant's duty to keep the leased premises repaired unless the tenant can show that the landlord induced the tenant through fraud or deceit to believe that the landlord would be responsible for making repairs. As a practical matter, if the lease is silent on the duty to repair and the nonprofit is the tenant, it is in the nonprofit's best interest to see how the landlord would "like to handle" the needed repairs. If the landlord voluntarily or gratuitously makes repairs, however, the landlord's actions do not constitute an admission or evidence of a duty to keep the leased facility in repair.

#### **If the nonprofit is the tenant of a facility that storm damage has left unsecured, who is responsible for maintaining security until repairs are made?**

If the lease doesn't say who is responsible for repairs, then the nonprofit, as the tenant, is responsible for securing the facility. Even if the landlord is responsible for making repairs, the nonprofit should still ensure its personal property is secured against theft or additional storm damage.

#### **If a nonprofit's leased facility needs to repair to resume operations, what should the nonprofit do expedite repairs?**

If the landlord has a duty to repair under the lease, the tenant should give the landlord written notice that the natural disaster damaged the facility and request the landlord repair the facility. If the landlord then fails to make the necessary repairs, the tenant could sue the landlord for damages. The tenant will ordinarily recover the difference between the rent agreed to in the contract and the rental value of the facility in the unrepaired condition), or, if the tenant has made the necessary repairs after the landlord failed to do so, the nonprofit would recover the reasonable cost of the repair. The tenant must not reduce lease payments to reimburse itself for repairs it has made without an agreement from the landlord (or without going to court and getting a judgment).

### **INSURANCE ISSUES:**

#### **If a nonprofit cannot operate due to damage from the disaster, will insurance cover the operating losses?**

A nonprofit should review its insurance policy to determine whether business interruption losses are covered and under what conditions.